SUPREME COURT, U. S.

FILE

DEC 28 1

MICHAEL RODAK, J

PETITION OF PETITIONER
WESTINGHOUSE ELECTRIC CORPORATION

In The

Supreme Court of the United States

October Term, 1974

No. 73-1014

VIRGINIA ELECTRIC AND POWER COMPANY,
WHO SUES FOR THE USE AND BENEFIT OF
INSURANCE COMPANY OF NORTH AMERICA,
Respondent,

v.

WESTINGHOUSE ELECTRIC CORPORATION,

AND

STONE & WEBSTER
ENGINEERING CORPORATION,
Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION OF PETITIONER WESTINGHOUSE ELECTRIC CORPORATION

Petitioner, Westinghouse Electric Corporation, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above case on October 3, 1973.

OPINIONS BELOW

The opinion of the District Court for the Eastern District of Virginia is not reported but is set forth in the Appendix at pp. 14-24.

The opinion of the Court of Appeals for the Fourth Circuit is reported at 485 F.2d 78. The opinion is set forth in the Appendix at pp. 1-12.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was made and entered on October 3, 1973. A copy of said judgment is set forth in the Appendix at p. 13. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

The questions presented are:

1. Can the rule of complete diversity of citizenship enunciated in *Strawbridge* v. *Curtiss,* 3 Cranch 267 (1806) be satisfied by avoiding the requirements of Rule 17(a), Federal Rules of Civil Procedure?

2. Did the Court of Appeals for the Fourth Circuit err in finding that Rule 17(a) may be disregarded, when the application of Rule 17(a) would, in this and other cases, properly bar the assertion of non-diverse, non-federal claims in a federal forum?

3. Did the Court of Appeals for the Fourth Circuit err in applying Rule 19, Federal Rules of Civil Procedure in this action?

STATUTES AND RULES INVOLVED

The applicable statute in this action is 28 U.S.C. § 1332. The statute is set forth verbatim in the Appendix at pp. 30-31. The statute may be found in Vol. 7 United States Code at pp. 7566-67 (1970 ed).

The applicable Federal Rule of Civil Procedure in this action is Rule 17(a). The rule is set forth verbatim in the Appendix at pp. 31-33. The rule may be found in Vol. 7 United States Code Appendix—Rules Of Civil Procedure For The United States District Courts at p. 7756 (1970 ed).

The decision below involved the application of Rule 19, Federal Rules of Civil Procedure. The rule is set forth verbatim in the Appendix at pp. 33-34. The rule may be found in Vol. 7 United States Code Appendix—Rules Of Civil Procedure For The United States District Courts at p. 7758 (1970 ed).

STATEMENT

This action was instituted by the Insurance Company of North America (hereinafter INA) in the name of Virginia Electric and Power Company (hereinafter Vepco), for the use and benefit of INA. Diversity jurisdiction was alleged as the basis for bringing the action in a federal forum. Vepco is a Virginia corporation; the defendant, Stone & Webster Engineering Corporation (hereinafter Stone & Webster), is a Massachusetts corporation; and the defendant, Westinghouse Electric Corporation (hereinafter Westinghouse), is a Pennsylvania corporation. INA is likewise a Pennsylvania corporation.

The complaint states that Vepco suffered damage to an electric generating facility and as a result sustained losses categorized as Additional Operating Costs. At the time of the alleged loss, INA insured Vepco's additional operating

costs. On January 19, 1968, INA accepted proof of loss and paid Vepco $1,990,000, leaving Vepco with an alleged additional loss of $200,000 (consisting of the $100,000 deductible and $100,000 in loss which INA and Vepco regarded as not covered under INA's policy).

By subrogation receipt dated January 16, 1968, INA was subrogated to all of the rights, claims and interest of Vepco against anyone liable for the loss to the extent of INA's $1,990,000 payment. The subrogation receipt authorized INA to bring an action for INA's claim in the name of Vepco and gave INA control of any litigation instituted in the name of Vepco.

After the assignment, INA filed a complaint in Vepco's name, asserting INA's claim in the amount of $1,990,000. Vepco's claim for $200,000 was also asserted in the complaint but Vepco did not participate in, or control any aspect of, the litigation.

Because the complaint included a claim for INA, which is non-diverse to Westinghouse, Westinghouse denied the jurisdictional allegations. Westinghouse asserted that INA was a real party in interest if its claim was to be litigated and unless INA voluntarily joined in the action its claim should be dismissed.

Stone & Webster raised a related issue by moving to dismiss for lack of jurisdiction because of the absence of complete diversity.

On November 3, 1972, the district court issued a memorandum opinion and Order in which it addressed Stone & Webster's motion to dismiss and denied the motion. (The memorandum opinion and Order are set forth in the Appendix at pp. 14-26). On November 10, 1972, the district court amended the November 3 Order by treating the tenth affirmative defense contained in the Answer filed by Westinghouse as a motion to dismiss and then denied this

motion on the basis of the previously filed memorandum. (This order is set forth in the appendix at p. 27.)

In its memorandum opinion, the district court held that although INA was a real party in interest, INA could pursue its claim in Vepco's name, thus avoiding the problem of complete diversity required by *Strawbridge* v. *Curtiss,* 3 Cranch 267 (1806).

The district court's Order was certified for an interlocutory appeal pursuant to 28 USCA § 1292, by amendment to that Order dated November 21, 1972. (This order is set forth in the Appendix at p. 28.) Thereafter, the Court of Appeals for the Fourth Circuit granted the petitions for an interlocutory appeal filed by Westinghouse and Stone & Webster by Order dated January 8, 1973, to determine if INA could pursue its non-diverse claim in the name of Vepco. (The order granting the appeal is set forth in the Appendix at pp. 29-30.)

The Court of Appeals ruled that INA was permitted to avoid the jurisdictional requirements of diverse citizenship by the use of Vepco's name and affirmed the decision of the lower court.

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed because it erroneously interprets and applies Rule 17(a), Federal Rules of Civil Procedure; because it erroneously construes the requirement of complete diversity of citizenship enunciated in 28 U.S.C. § 1332 and in *Strawbridge* v. *Curtiss,* 3 Cranch 267 (1806); and because it erroneously interprets and applies Rule 19, Federal Rules of Civil Procedure.

Moreover, the decision below appears to conflict with the decisions of this Court in *United States* v. *Aetna Cas. & Surety Co.,* 338 U.S. 366 (1949) and with the decision

of the Court of Appeals for the Fifth Circuit in *Sunray Oil Corp.* v. *Allbritton,* 187 F.2d 475 (1951).

Can The Rule Of Complete Diversity Of Citizenship Enunciated In Strawbridge v. Curtiss, 3 Cranch 267 (1806) Be Satisfied By Avoiding The Requirements Of Rule 17(a), Federal Rules Of Civil Procedure?

Did The Court Of Appeals For The Fourth Circuit Err In Finding That Rule 17(a) May Be Disregarded, When The Application Of Rule 17(a) Would, In This And Other Cases, Properly Bar The Assertion Of Non-Diverse, Non-Federal Claims In A Federal Forum?

The Court of Appeals held that Vepco could prosecute INA's claim in a federal court even though Vepco, by subrogation receipt, had, before the institution of this action, assigned that claim to INA, which like Westinghouse is a citizen of Pennsylvania. In so ruling, the Court of Appeals held that a real party in interest is not required to pursue its own claim in its own name.

This decision disregards the mandate of Rule 17(a) by allowing the prosecution of a claim by a person who does not own the claim. Moreover, this decision disregards the mandate of complete diversity of citizenship for it permits INA, which is in complete and exclusive control of this action, to have its claim adjudicated in a federal forum even though it is non-diverse to the petitioner, Westinghouse. Thus, the decision below permits INA to do indirectly that which 28 U.S.C. § 1332 and the decision in *Strawbridge* v. *Curtiss, supra,* prohibit it from doing directly.

In its decision the Court of Appeals observed that:

> "'Rule 17(a) is a barnacle on the federal practice ship. It ought to be scraped away. . . .'" Appendix at p. 6.

The Court of Appeals also commented that:

> "About the best that can be said of Fed.R.Civ.P. is that it conveys a certain amount of correct information about naming plaintiffs. C. Wright, Law of Federal Courts § 70, at 293-94 (2d ed. 1970). Originally intended to incorporate the more permissive practice of equity to permit persons having an equitable or beneficial interest to sue in their own names, it is now thought by some commentators to serve only to confuse the already complex problems of determining whether diversity of citizenship exists." Appendix at p. 5.

Rule 17(a) is a clear and specific requirement of the Federal Rules of Civil Procedure. That rule cannot be cast aside simply because its proper application results in less than complete diversity of citizenship. The requirement of Rule 17(a) can no more be disregarded than can the mandates of 28 U.S.C. § 1332 and *Strawbridge* v. *Curtiss, supra.*

However, the decision below disregards both Rule 17(a) and the requirement of complete diversity of citizenship apparently because the Court of Appeals concluded that the only purpose of Rule 17(a) is to prevent multiplicity of suits. The conclusion was apparently based upon this Court's decision in *United States* v. *Aetna Cas. & Surety Co., supra,* on the decision in *Gas Service Co.* v. *Hunt,* 183 F.2d 417 (10th Cir. 1950), and on a passage from Professor Wright's hornbook which also relies in part on *Aetna* and *Gas Service.* Professor Wright observes:

> "If the insurer has paid the entire loss, it is the real party in interest and must sue in its own name. The insured, who no longer has any interest in the recovery, cannot sue. If the insurer has paid only part of the loss, either the insured or the insurer may sue, but the defendant can compel joinder of the other in order to avoid being subjected to a multiplicity of suits." C.

Wright, Law of Federal Courts § 70 at 294 (2d Ed. 1970).

An examination of the decisions in *Aetna* and *Gas Service* indicates clearly that avoidance of multiple law suits is not the only purpose of Rule 17(a). Indeed, in *Aetna* this Court has observed that its proper application may properly result in more than one action on the same claim.

In *Aetna,* this Court held that:

> "... an insurer-subrogee, who has substantive equitable rights, qualifies as such [a real party in interest]. If the subrogee has paid an entire loss suffered by the insured, it is the only real party in interest and must sue in its own name. [citations omitted]. If it has paid only part of the loss, both the insured and the insurer (and other insurers, if any, who have also paid portions of the loss) have substantive rights against the tortfeasor which qualify them as real parties in interest." 338 U.S. at 380-81.

The Court then considered whether, in a case of partial subrogation, all parties in interest must join in the action. The Court held that "... *both* [*insured and insurer*] *'own' portions of the substantive right and should appear in the litigation in their own names.*" 338 U.S. at 381 (emphasis added). Obviously aware of the practical effect of its decision, the Court continued to observe:

> "It is true that under this rationale, there will be cases in which all parties cannot be joined because one or more are outside the jurisdiction, and the court may nevertheless proceed in the action under Rule 19(b). In such cases the United States, like other tortfeasors, may have to defend two or more actions on the same tort and may be unable to assert counterclaims and offsets against the original claimant upon unrelated transactions." 338 U.S. at 382.

It is thus the fundamental command of Rule 17(a) and *Aetna* that, if a real party in interest wishes to have his claim adjudicated, he must pursue his claim in his own name.

An examination of the decision in *Gas Service Co.* v. *Hunt,* 183 F.2d 417 (10th Cir. 1950), clearly indicates that the court based its decision upon the patent requirement that a real party in interest must pursue its claim in its own name. Thus, although the proper application of Rule 17(a) in *Gas Service* resulted in joinder of the real party in interest, the court did not base its decision on the avoidance of multiple suits.

Under applicable law, INA is owner of the substantive right of action. *McKay* v. *Citizens Rapid Transit Co.,* 190 Va. 851, 860, 599 S.E.2d 121 (1950); *Vance* v. *Maytag Sales Corp.,* 159 Va. 573, 165 S.E. 393 (1932). Under state procedural law Vepco could sue for INA's use and benefit. Va. 851, 860, 59 S.E.2d 121 (1950); *Vance* v. *Maytag* INA, as owner of the substantive right of action, must sue in its own name if enforcement of the right is sought in a federal forum. *United States* v. *Aetna Cas. & Surety Co., supra; Gas Service Co.* v. *Hunt, supra.*

Other courts have also held that Rule 17(a) is mandatory and cannot be disregarded.[1] *In City Stores Co.* v. *Lerner Shops, Inc.,* 410 F.2d 1010 (D.C. Cir. 1969) the court held that an insurer which had remitted payment to its insured pursuant to a loan receipt agreement was, in fact, a subrogee and therefore was a real party in interest which must appear in its own name under Rule 17(a). The court found it significant that the insurers had the exclusive direction

[1] See generally, *Askey* v. *C&M Service,* 45 F.R.D. 242 (M.D. Pa. 1968); *Northboro Apartments, Inc.* v. *Wheatland Tube Co.,* 198 F. Supp. 245 (E.D. Pa. 1961); *McWhirter* v. *Otis Elevator Co.,* 40 F. Supp. 11 (W.D. S.C. 1941).

and control of the suit filed in the name of the insured by virtue of the "loan receipt agreements," and observed:

> "It [the loan receipt agreement] can be more accurately described as a complete surrender to the insurer of the insured's right of action against third parties. By executing such a document, the insured simply sells to the insurance company the right to use his name as a party plaintiff in a suit brought against a third party which is to be exclusively directed and controlled by the insurer at its expense and for its benefit." *Id.* at 1014-15.

The court refused to permit the insurer to invoke the loan receipt agreement to evade the mandate of Rule 17(a). The insurer then asserted that, in order to invoke Rule 17(a), the defendant must show prejudice. The court stated:

> "This does not seem to be a valid reason; our view is that *a defendant is entitled to the benefit of Rule 17(a) without showing he will otherwise be prejudiced.*" *Id.* at 1015. (Emphasis added).

The court continued to note that:

> "Rule 17(a) is plain, common sense: a defendant has the right to require the joinder of the real party in interest as a party plaintiff." *Id.*

While this suit does not involve a loan receipt agreement, it is clear that Vepco has taken no interest in pursuing this litigation and that Westinghouse and Stone & Webster are entitled to have the real party in interest, the party which is pursuing them and which is in direct and exclusive control of the litigation, before the court, if that party is to attempt to recover for itself $1,990,000. This is required by Rule 17(a).

Although *Lerner Shops* held that a showing of prejudice

was not required for a party to claim the benefit of Rule 17(a), there is prejudice in this case by requiring defendants to litigate in a federal forum a matter which should only be litigated in a state court, namely INA's claim for $1,990,000.

The consequence of the failure of the real party in interest to appear in the litigation is the dismissal of his portion of the claim. This was the result in *Sunray Oil Corp.* v. *Allbritton,* 187 F.2d 475 (5th Cir. 1951) wherein the Court of Appeals set aside the judgment in favor of the real party in interest who refused to prosecute its claim in its own name.

In *Sunray,* a workmen's compensation insurer had paid an injured employee $13,084.70 in benefits. The employee, Allbritton, sued the third party and also sought to recover the amount of workmen's compensation benefits on behalf of the insurer. In reducing the employee's award by the amount of the insurer's claim, the court held:

> "Though it [the insurer] was the real party in interest, with the right to sue therefor [the $13,084.70], it was not a party to this suit, having failed and refused to prosecute it against appellant [the negligent defendant]. Instead, it sought to recover without suing by agreeing with appellee [the employee] that, if he would bring the suit, he could recover, and hold for it, all sums that it was entitled to recover against defendant by virtue of its subrogation rights under the laws of Texas." *Id.* at 477.

Relying on Rule 17(a), the court reduced the judgment by the amount of the insurer's claim.

It has also been held that, if the application of Rule 17(a) would result in less than complete diversity, the action should be dismissed. *Northern Assurance Co.* v. *Associated Inde-*

pendent Dealers, 313 F. Supp. 816 (D. Minn. 1970). On the other hand, if the action is allowed to proceed, no recovery in excess of Vepco's claim could be obtained because the owner of the claim would not be before the court. *Id.*

It is axiomatic that the Federal Rules of Civil Procedure do not expand or contract the jurisdiction of federal courts. It is equally axiomatic that the Federal Rules of Civil Procedure cannot be disregarded, or cannot, like a barnacle, be scraped away. Rule 17(a) requires that the realities of the case be considered in determining whether diversity jurisdiction exists. Under applicable substantive law INA is the owner of the right which it seeks to enforce in Vepco's name. Under Rule 17(a), INA, as the owner of the right sought to be enforced, must prosecute its claim in its own name. However, the decision below permits INA to accomplish indirectly that which Rule 17(a), the decision in *Strawbridge* v. *Curtiss, supra,* and the provisions of 28 U.S.C. § 1332 prohibit it from doing directly. The result is an expansion of the jurisdiction of the federal courts in violation of the terms of 28 U.S.C. § 1332.

Because the decision below involves an important issue of federal jurisdictional law; because this case involves an important issue relating to the interpretation and application of Rule 17(a), Federal Rules of Civil Procedure; and because this case involves an apparent conflict with a decision of this Court and with a decision of the Court of Appeals for the Fifth Circuit, it is submitted that this case is a peculiarly appropriate one for the exercise of this Court's discretionary jurisdiction.

Did The Court Of Appeals For The Fourth Circuit Err In Applying Rule 19, Federal Rules Of Civil Procedure, In This Action?

Both the district court and the Court of Appeals for the Fourth Circuit have assumed that the application of Rule

17(a) would require the dismissal of Vepco's claim. Westinghouse has never asserted that Vepco's claim must be dismissed. It asserts only that INA cannot, simply by using Vepco's name, prosecute its claim in this action. Vepco's claim must be dismissed only if INA prosecutes its claim in this action. However, because of this apparent misconception as to the effect on Vepco's claim, the Court of Appeals found it necessary to apply the provisions of Rule 19 in order to save Vepco's claim.

Rule 19 involves the problem of compulsory joinder. Rule 19 requires the application of certain criteria in situations where joinder is necessary to preserve a claim already in litigation. Conversely, Rule 19 permits claims in existing litigation to proceed without joining a person which ordinarily should be joined. Rule 19 nowhere permits or authorizes litigation of the absent person's claim.

There is no dispute that Vepco can, if it is so advised, prosecute its claim without joining INA. Thus, the application of Rule 19, involving issues of compulsory joinder, to save Vepco's claim was an unnecessary exercise. Indeed, the application of Rule 19 in this action operates to permit litigation of the claim of a real party in interest even though it is absent from the litigation.

Thus, the application of Rule 19 permits a result not authorized by Rule 19. Moreover, it permits a result totally at odds with Rule 17 and with the provisions of 28 U.S.C. § 1332.

In arriving at the decision below, the Court of Appeals relied upon this Court's decision in *Provident Tradesmens Bank & Trust Co.* v. *Patterson,* 390 U.S. 102 (1968). An examination of the *Provident Tradesmens* decision indicates that the non-party's interest was not litigated. Indeed, this Court simply held that the claim of those who were par-

ties to the action would be litigated in the absence of the party whom the Court of Appeals for the Third Circuit had concluded was indispensable.

However, the decision below authorizes a full adjudication of INA's claim even in its absence and authorizes Vepco to proceed with its claim and with INA's claim, even though INA has been determined to be the real party in interest to the extent of its payment to Vepco.

Westinghouse submits that *Provident Tradesmens* holds that Vepco's claim can proceed without INA. Westinghouse has never asserted differently. For that reason there is no reason to apply Rule 19.

Indeed, the patent reality of this case is that Vepco has demonstrated no interest in prosecuting its claim. Even before the institution of this action Vepco relinquished complete and exclusive control of any future litigation to INA and granted INA the right to use Vepco's name in any such litigation.

The application of Rule 19 was urged by INA to save its claim and to avoid the requirements of Rule 17(a) and of complete diversity of citizenship.

The decision below takes the matter full circle and erroneously interprets and applies Rule 19 and by so doing permits INA to avoid the requirements of complete diversity of citizenship and to avoid the mandate of Rule 17(a).

Because the decision below involves an important issue arising under Rule 19, Federal Rules of Civil Procedure, it is submitted that this case is a peculiarly appropriate one for the exercise of this Court's discretionary jurisdiction.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 73-1212

Virginia Electric and Power Company, who sues for the use and benefit of Insurance Company of North America,

Appellee,

versus

Westinghouse Electric Corporation and Stone & Webster Engineering Corporation,

Appellants.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Robert R. Merhige, Jr., District Judge.

(Argued June 4, 1973 Decided October 3, 1973).

Before HAYNSWORTH, Chief Judge, and CRAVEN and WIDENER, Circuit Judges

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James L. Sanderlin (Robert E. Payne, McGuire, Woods and Battle on brief) for Appellant Westinghouse Electric Corporation; Charles W. Laughlin (J. Edward Betts, Christian, Barton, Parker, Epps and Brent on brief) for Appellant Stone and Webster Engineering Corporation; Edward A. Marks, Jr., (Frank B. Miller, III, Albert M.

Orgain, IV, and Sands, Anderson, Marks and Clark on brief) for Appellee.

CRAVEN, Circuit Judge:

Virginia Electric and Power Company (VEPCO) brought this action on April 16, 1969, on its own behalf and on behalf of its insurer and partial subrogee, Insurance Company of North America (INA), to recover damages resulting from the failure of one of VEPCO's power generating stations. The defendants are Westinghouse Electric Corporation, builder of the station, and Stone and Webster Engineering Corporation, the engineers. Jurisdiction was founded on diversity of citizenship under 28 U.S.C. § 1332.

The defendants moved to dismiss the action, urging that INA, by virtue of the subrogation, was the real party in interest under Fed. R. Civ. P. 17 and must prosecute the action as plaintiff. Since INA is a Pennsylvania corporation, its joinder as party plaintiff would destroy diversity jurisdiction and require dismissal because defendant Westinghouse is also a Pennsylvania corporation. Alternatively, the defendants urged that INA was an indispensable person who could not be made a party (because to do so would destroy diversity jurisdiction) and that under Fed. R. Civ. P. 19(b) the action should be dismissed. The district court denied the motion to dismiss and certified, under 28 U.S.C. § 1292(b), that a controlling question of law was involved as to which there existed a substantial ground for difference of opinion and that an immediate appeal would materially advance the litigation. We granted an interlocutory appeal to determine whether the district court properly concluded VEPCO could pursue this action for the entire loss and that the action could continue without joinder of INA. We think so, and affirm.

I.

On January 22, 1967, a failure occurred at VEPCO's Mount Storm Generating Station, resulting in alleged losses of approximately $2,200,000. There was in effect an insurance policy issued by INA securing VEPCO against the risk of additional operating costs due to physical damage or loss to facilities. The policy contained a $100,000 deductible clause. Pursuant to the policy, INA originally paid VEPCO $1,900,000.

VEPCO then brought this action on its own behalf for $200,000 (the $100,000 loss uninsured under the deductible provision of the insurance policy plus $100,000 alleged expediting expenses) and for $1,900,000 for its insurer, INA. VEPCO also instituted a separate action against INA for an alleged balance owing under the insurance policy of approximately $200,000. VEPCO and INA settled that action, and VEPCO received an additional $50,000 from INA, leaving VEPCO with an unreimbursed loss of $150,000. In consideration of the settlement, VEPCO and INA agreed that INA would furnish counsel and have exclusive control over the present action and that INA would prosecute VEPCO's claims for the remaining uninsured loss.[1]

---

[1] VEPCO executed a cooperation agreement which provided in part:

> Vepco also agrees that the conduct of the continuing action to recover against Westinghouse and/or S. & W. for such claims shall be under the exclusive direction and control of the Insurer. . . .
>
> (7) Vepco and I.N.A. further agree that counsel for I.N.A. shall represent its claims, if any, against Westinghouse and/or S. & W. for uninsured loss, claim for which is in the sum of $150,000.00, but it shall be under no obligation for costs and expenses incurred in the prosecution of such claims conjunctively with those to which I.N.A. is subrogated.

Additionally, VEPCO executed a subrogation agreement whereby INA was subrogated to the rights of VEPCO against Westinghouse and Stone and Webster.[2]

The district court, construing the agreement of cooperation and the instrument of subrogation, found "that VEPCO has retained a pecuniary interest and that standing is retained by virtue of its intent to recover the uninsured loss." This finding is not contested on appeal. The district court then held that VEPCO as a real party in interest could proceed in the action to attempt to recover the full loss. The court concluded that INA was also a real party in interest and that the question of INA's joinder was to be determined under Rule 19. The district court found: (1) that nonjoinder would not prejudice the parties, (2) any danger of double claims against the defendants could be protected against by appropriate decrees;[3] (3) no other adequate forum existed for the resolution of the dispute in view of the interstate character of the dispute and the problems involved in obtaining personal jurisdiction in a state court. The court determined that in equity and good conscience the action should proceed among the parties before it without joinder of INA.

---

[2] The subrogation instrument provided in relevant part:

> . . . Vepco hereby subrogates the Insurer to all of its remaining rights of recovery against Westinghouse Electric Corporation and/or Stone & Webster Engineering Corporation . . . for the losses and claims and damages resulting from an occurrence on January 22, 1967, at its Mount Storm Power Station, Mt. Storm, West Virginia. . . .

[3] Counsel for INA has now represented to the court that INA is willing to execute an agreement binding it to any final judgment in this action. Brief for appellee at 22.

II.

About the best that can be said for Fed. R. Civ. P. 17[4] is that it conveys a certain amount of correct information about naming plaintiffs. C. Wright, Law of Federal Courts § 70, at 293-94 (2d ed. 1970). Originally intended to incorporate the more permissive practice of equity to permit persons having an equitable or beneficial interest to sue in their own names, it is now thought by some commentators to serve only to confuse the already complex problems of determining whether diversity of citizenship exists. 6 C. Wright & A. Miller, Federal Practice & Procedure: Civil § 1541. Intended to expand the class of those who may sue to include persons having an equitable or beneficial interest, the rule is unfortunately susceptible to efforts to prevent prosecution of claims as illustrated by this appeal. Ingenious counsel are enabled to present yet another "decision point" resulting in extravagant expenditures of time and effort before ever reaching the merits. See J. Frank, American Law, The Case for Radical Reform 65 (1969).

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[4] Fed. R. Civ. P. 17(a) provides:

> (a) Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

"Rule 17(a) is a barnacle on the federal practice ship. It ought to be scraped away.... Rules 19, 17(b) and substantive rules as to stating a claim for relief are adequate without interjecting the meaningless, logically inconsistent commands of the real party in interest rule...." Kennedy, Federal Rule 17(a): Will the Real Party in Interest Please Stand?, 51 Minn. L. Rev. 675, 724 (1967).

The meaning and object of the real party in interest principle embodied in Rule 17 is that the action must be brought by a person who possesses the right to enforce the claim and who has a significant interest in the litigation.[5] Whether a plaintiff is entitled to enforce the asserted right is determined according to the substantive law. In a diversity action such as this one, the governing substantive law is the law of the state.[6] While the question of in whose name the action must be prosecuted is procedural, and thus governed by federal law, its resolution depends on the underlying substantive law of the state.[7]

In the present case it appears that VEPCO has both a sufficient interest in the litigation and is entitled under the substantive law to recover for the entire loss resulting from the failure of its generating station. VEPCO retained a significant pecuniary interest in the litigation. Thus this is not

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[5] 6 C. Wright & A. Miller, Federal Practice & Procedure: Civil § 1542, at 639, § 1543 at 643-44 (1971) [hereinafter cited as *Wright & Miller*]; 3A J. Moore, Federal Practice ¶ 17.02 at 53 (2d ed. 1970) [hereinafter cited as *Moore*].

[6] United States v. 936.71 Acres of Land, 418 F.2d 551 (5th Cir. 1969); Hoeppner Constr. Co. v. United States *ex rel.* Mangum, 287 F.2d 108 (10th Cir. 1960); *Moore*, ¶ 17.07 at 224-25. *See also* Travelers Indem. Co. v. Westinghouse Elec. Corp., 429 F.2d 77 (5th Cir. 1970); Standard Accident Ins. Co. v. Lohman, 295 F.2d 261 (7th Cir. 1961).

[7] *Cf.* Gas Serv. Co. v. Hunt, 183 F.2d 417 (10th Cir. 1950).

a case where an insurer-subrogee has paid an *entire* loss suffered by the insured and is the only real party in interest who must sue in his own name. *United States* v. *Aetna Casualty & Surety Co.*, 338 U.S. 366, 380-81 (1949).[8] In addition to having a sufficient interest in the litigation, VEPCO, as subrogor, is entitled under the substantive law to bring suit for its entire loss.[9] VEPCO, being entitled to enforce the right, may bring this action even though INA will ultimately receive the major portion of any recovery.[10]

To allow VEPCO to maintain this action for the entire loss accords with the purposes of Rule 17. Under the common-law practice, a subrogee or assignee could enforce his rights only in the name of his subrogor or assignor. The original purpose of Rule 17 was to liberalize party rules, *i.e.*, to allow an assignee or subrogee to enforce his rights in his own name.[11] The permissive function of Rule 17 has been accomplished, and Rule 17 now serves primarily a negative

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[8] *See also* City Stores Co. v. Lerner Shops, 410 F.2d 1010 (D.C. Cir. 1969). Where an insured has been fully recompensed but appears as a party, the insured is a nominal party only. The insured's citizenship is not considered for purposes of diversity of citizenship, and upon timely motion the insurer-subrogee must be substituted as the party plaintiff. Link Aviation, Inc. v. Downs, 325 F. 2d 613 (D.C. Cir. 1963). In the present case, the subrogation is only partial, and it is only the citizenship of the plaintiff, VEPCO, which is considered in determining diversity. C. Wright, Law of Federal Courts § 28-29 (2d ed. 1970).

[9] Miller v. Tomlinson, 194 Va. 367, 73 S.E.2d 378 (1952); Glens Falls Ins. Co. v. Sherritt, 95 F.2d 823 (4th Cir. 1938); Carozza v. Boxley, 203 F. 673 (4th Cir. 1913). Va. Code Ann. § 38.1-31.2 (Supp. 1970) provides that an insurer-subrogee may bring suit in its own name, but this is permissive and does not prevent the subrogor from suing for the entire loss.

[10] *Wright & Miller*, § 1543, at 643-44. *See* Interstate Fire Ins. Co. v. Sayers, 468 F.2d 1361 (5th Cir. 1972); Jackson Mfg. Co. v. United States, 434 F.2d 1027 (5th Cir. 1970).

[11] Notes of Advisory Committee on Rules, Fed. R. Civ. P. 17, U.S.C.A. at 16.

function. It is to enable a defendant to present defenses he has against the real party in interest, to protect the defendant against a subsequent action by the party actually entitled to relief, and to ensure that the judgment will have proper res judicata effect.[12] In view of its current purpose, to protect defendants against subsequent suits, Rule 17 will not bar a suit by a real party in interest which will have the effect of preventing a multiplicity of suits.[13]

Where there is partial subrogation, there are two real parties in interest under Rule 17. Either party may bring suit—the insurer-subrogee to the extent it has reimbursed the subrogor, or the subrogor for either the entire loss or only its unreimbursed loss. If either the subrogor or subrogee brings suit, joinder is often appropriate upon proper motion by the defendant.[14] But joinder is not appropriate, and certainly not required by Rule 17, for the purpose of destroying diversity jurisdiction and requiring dismissal. Even without joinder the partial-subrogee is generally precluded from bringing a subsequent action against the defendants where a judgment has been rendered in a suit by the subrogor for the entire loss.[15] Multiplicity of suits, one

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[12] Celanese Corp. v. John Clark Indus., Inc., 214 F.2d 551 (5th Cir. 1954). *See generally* United Fed'n of Postal Clerks, AFL-CIO v. Watson, 409 F.2d 462, 470-71n.34 (D.C. Cir.), *cert. denied,* 396 U.S. 902 (1969).

[13] United Fed'n of Postal Clerks, AFL-CIO v. Watson, 409 F.2d 462, 470 (D.C. Cir.), *cert. denied,* 396 U.S. 902 (1969). It is urged that INA is already a party to the litigation by virtue of its being named a use plaintiff and because of the presence of its counsel. We think neither factor makes INA a party and that VEPCO may properly represent INA. *See* cases cited note 9 *supra.*

[14] *Aetna,* 338 U.S. at 381-82; Kansas Elec. Power Co. v. Janis, 194 F.2d 942, 944 (10th Cir. 1952); National Garment Co. v. New York, C. & St. L. R.R., 173 F.2d 32 (8th Cir. 1949).

[15] Joyner v. F & B Enterprises, Inc., 448 F.2d 1185 (D.C. Cir. 1971). Under substantive law the partial subrogee may be collaterally estopped

by the subrogor for his loss and one by the subrogee for the reimbursed loss, is thus prevented as fully as if joinder were compelled.

In the present case INA will clearly be precluded from subjecting Westinghouse and Stone and Webster to further suits. Under the cooperation agreement between VEPCO and INA filed with the court, INA has full and exclusive control of the litigation. It is settled under the applicable substantive law that any judgment will have full res judicata effect as to INA in these circumstances.[16]

Thus we conclude that the district court properly allowed the suit to continue with VEPCO as the party plaintiff. "It would result in unnecessary hardship and confusion to hold that such a company [as INA], entitled to partial subrogation, . . . must go into a state court and try over again issues that [will be] settled in the federal court. There is nothing in modern practice which sanctions any such absurdity." *Virginia Electric & Power Co.* v. *Carolina Peanut Co.,* 186 F.2d 816, 821 (4th Cir. 1951).

As noted, the modern function of Rule 17 is to prevent the defendant from being subjected to subsequent suits. In *Provident Tradesmens Bank & Trust Co.* v. *Patterson,* 390 U.S. 102 (1968), the Court stated that one of the primary considerations under Rule 19 in whether to allow a suit to continue where a party cannot be joined is the protection of a defendant from multiple litigation, or inconsistent relief.

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from bringing a subsequent action and any recovery by the subrogor is impressed with a trust in favor of the subrogee. *See* Braniff Airways, Inc. v. Falkingham, 20 F.R.D. 141 (D. Minn. 1957). Also, as here, the subrogee may agree to be bound by the judgment. Urrutia Aviation Enterprises, Inc. v. B. B. Burson & Assoc., 406 F.2d 769 (5th Cir. 1969).

[16] Patterson v. Saunders, 194 Va. 607, 74 S.E.2d 204, *cert. denied,* 345 U.S. 998 (1953).

390 U.S. at 10. In view of this overlap between Rule 17 and Rule 19, we think the emphasis in a case such as this should be on whether under Rule 19 the action should be allowed to continue without joinder of the absent party.[17] That an absent person who cannot be joined is a real party in interest does not conclude the matter—the court must determine whether, in equity and good conscience, the action should proceed without the person.[18]

III.

It is clear that a partial subrogee is a person to be joined if feasible under Fed. R. Civ. P. 19(a).[19] *United States* v.

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[17] *See* Gargis v. B. F. Goodrich Co., 386 F.2d 534 (3d Cir. 1967); Hoeppner Constr. Co. v. United States *ex rel.* Mangum, 287 F.2d 108 (10th Cir. 1960); Peoples Loan & Finance Corp., v. Lawson, 271 F.2d 529 (5th Cir. 1959), *cert. denied*, 362 U.S. 903 (1960); Celanese Corp. v. John Clark Indus., Inc., 214 F.2d 551 (5th Cir. 1954); Potomac Elec. Power Co. *ex rel.* Royal Indem. Co. v. Babcock & Wilcox Co., 54 F.R.D. 486 (D. Md. 1972); Maryland *ex rel.* Geils v. Baltimore Transit Co., 37 F.R.D. 34 (D. Md. 1965).

[18] C. Wright, Law of Federal Courts § 70, at 296 (2d ed. 1970).

[19] Fed. R. Civ. P. 19(a) provides:

> (a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

Aetna Casualty & Surety Co., 338 U.S. 366, 381-82 (1949). However, here the partial subrogee, INA, cannot be joined without destroying diversity jurisdiction, and Rule 19 by its own terms exhibits concern that the courts not be deprived of jurisdiction by unnecessary joinder. Fed. R. Civ. P. 19(a). In such a case the court must consider the four factors enumerated in Rule 19(b)[20] to determine whether in equity and good conscience the action should proceed, or should be dismissed, the absent person being regarded as indispensable. "Whether a person is 'indispensable,' that is, whether a particular lawsuit must be dismissed in the absence of that person, can only be determined in the context of particular litigation." *Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U.S. 102, 118 (1968).

A review of the four interests which must be considered by the district court in its discretion demonstrates that the court below properly allowed the action to continue without joinder of INA. First, it is difficult to see how a judgment in this action might be prejudicial to either INA or the parties before the court. INA has control of the litigation and the opportunity to fully litigate its derivative rights arising out

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[20] Fed. R. Civ. P. 19(b) provides:

> (b) Determination by Court Whenever Joinder not Feasible. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

of subrogation. The defendants have failed to show how they would be prejudiced on the merits by nonjoinder of INA. Second, if any prejudice were shown, it can be avoided by the shaping of relief. Third, it is clear that a judgment rendered in INA's absence will be fully adequate to protect both INA and the parties and the public interest in the termination of disputes on the merits. The defendants have not sought any affirmative relief against VEPCO and do not suggest they would seek affirmative relief against INA if it were joined. Also because of INA's control of the suit, it will be bound by any judgment in favor of the defendants.[21] Fourth, it is not clear that plaintiff would have an adequate remedy in the courts of either Virginia or another state against both Stone and Webster and Westinghouse.[22] INA, the partial subrogee, is thus clearly not an "indispensable" party to this litigation. *See United States* v. *Aetna Casualty & Surety Co.*, 338 U.S. 366, 382n.19 (1949); *Peoples Loan & Finance Corp.* v. *Lawson*, 271 F.2d 529, 532 (5th Cir. 1959), *cert. denied*, 362 U.S. 903 (1960). The district court below correctly allowed the action to continue without joinder of INA.[23]

Accordingly, for the reasons stated, the decision of the district court is

AFFIRMED.

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[21] Patterson v. Saunders, 194 Va. 607, 74 S.E.2d 204, *cert. denied*, 345 U.S. 998 (1953).

[22] It further appears that commencement of suit in another court may now be barred by the statute of limitations. 7 C. Wright & A. Miller, Federal Practice & Procedure: Civil § 1608, at 80 (1972).

[23] *See Moore*, ¶ 19.14[1]; 7 C. Wright & A. Miller, Federal Practice & Procedure: Civil § 1608 (1972).

JUDGMENT

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 73-1212

Virginia Electric and Power Company, who sues for the use and benefit of Insurance Company of North America,

Appellee,

vs.

Westinghouse Electric Corporation and Stone & Webster Engineering Corporation,

Appellants.

Appeal from the United States District Court for the Eastern District of Virginia.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

/s/ William K. Slate, II
Clerk

Filed Oct. 3, 1973.
William K. Slate, II, Clerk.
A True Copy, Teste:

By J. V. Layne
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

CIVIL ACTION No. 147-69-R

VIRGINIA ELECTRIC AND POWER COMPANY,
WHO SUES FOR THE USE AND BENEFIT OF
INSURANCE COMPANY OF NORTH AMERICA

v.

WESTINGHOUSE ELECTRIC CORPORATION

and

STONE & WEBSTER
ENGINEERING CORPORATION

MEMORANDUM

Filed November 3, 1972

Plaintiff brings this suit for damages arising out of the failure of the Mount Storm Power Generating Station on January 22, 1967. Jurisdiction is alleged by virtue of 28 U.S.C. § 1332.

The basic facts are as follows:

Plaintiff, Virginia Electric and Power Company, hereinafter referred to as VEPCO, secured a policy with Insurance Company of North America, hereinafter referred to as INA, insuring it against risk of additional operating costs due to physical damage or loss to facilities. The policy

contained a $100,000 deductible clause. On January 22, 1967, VEPCO, as the result of an occurrence at its Mount Storm Power Generating Station, suffered alleged losses of $2,212,428.00. INA, pursuant to the policy, paid VEPCO $1,990,000. (VEPCO instituted a separate action for the alleged balance owing of $222,428 less applicable deductions, *infra*). Also pursuant to the contract, INA became subrogated to the rights of VEPCO on any claims of the latter against those who might be sued by VEPCO for the generator loss. Plaintiff VEPCO filed this action on behalf of itself for $200,000 damages (the $100,000 deductible amount plus $100,000 alleged expediting expenses) and its salvagee, INA, for $1,900,000 against Westinghouse Electric Corporation, hereinafter referred to as Westinghouse, the builder of the station, and Stone and Webster Engineering Corporation, the engineers.

The history of prior pleadings of the action herein is long and complex. The action was commenced by a complaint filed under the style of *Virginia Electric and Power Company, for the use and benefit of Insurance Company of North America* v. *Westinghouse Electric Corporation and Stone & Webster Engineering Corporation,* the jurisdictional averments of which claim that diversity of citizenship exists between VEPCO and each of the defendants.

To this complaint, Westinghouse filed an answer in which it denies the jurisdictional averments of the complaint and, as its tenth defense, alleges that INA is the real party in interest which must prosecute the claim in its own name and accordingly be joined as a party plaintiff. Additionally, the pleading contained a cross-claim against Stone & Webster Engineering Corporation, hereinafter referred to as Stone & Webster, under which Westinghouse sought to recover on two counts. The first count alleged that the

negligence of Stone & Webster was primary, active and affirmative whereas any fault on the part of Westinghouse was passive and secondary, as a result of which it sought indemnity from Stone & Webster. In Count Two of the cross-claim, it sought to recover over against Stone & Webster on certain additional items upon similar allegations thereto.

In its responsive pleading to the original complaint, Stone & Webster filed a four count cross-claim against Westinghouse in which it alleged that its liability, if any, to the plaintiff was the result of the primary, active and affirmative fault of Westinghouse and that it would be entitled to indemnity from Westinghouse accordingly. In the Second Count of this cross-claim Stone & Webster alleges that certain contractual obligations between it and Westinghouse pertinent to the matters herein would provide indemnity against any loss existing from this litigation. In its Third Count, Stone & Webster alleges certain express warranties running from Westinghouse to it, the breach of which is claimed to have caused the loss. In its Fourth Count it relies upon implied warranties running to it from Westinghouse covering the machinery and equipment involved in the litigation.

Additionally, Stone & Webster filed as a part of its response a counterclaim against VEPCO based upon an alleged contract between them, and sought indemnity from VEPCO with respect thereto.

Each of the defendants responded affirmatively to the crossclaims mentioned. Accordingly, we now have a situation in which the original complaint seeks relief against both Westinghouse and Stone & Webster; they in turn seek relief against each other; Stone & Webster additionally seeks relief against VEPCO, which VEPCO resists.

On February 1, 1971, the Court filed two orders dealing with thirteen motions previously raised which grew out of the above recited case history. The abundant motion practice herein has yet to subside and the parties are before the Court on the following:

1. Motion by Stone & Webster for judgment on the pleadings on the basis that the complaint fails to state a claim upon which relief can be granted;

2. Motion by Stone & Webster to dismiss because VEPCO allegedly split its cause of action against Stone & Webster;

3. Motion by Westinghouse to dismiss on the ground VEPCO allegedly splits its cause of action against Westinghouse;

4. Motion by Stone & Webster to dismiss for want of proper diversity jurisdiction;

5. Additionally, INA has moved the Court to consolidate or jointly try the above-styled action with VEPCO v. INA, Civil Action No. 220-71-R, in which VEPCO originally sought an alleged balance owing under the above described insurance policy and in which Stone & Webster and Westinghouse have been sued by INA as Third Party Defendants on a theory of indemnification.

Subsequent to the filing of said motions, VEPCO and INA settled their controversy in VEPCO v. INA, etc., Civil Action No. 220-71-R, over the alleged balance of $222,428 owing on the aforementioned policy. Pursuant to said settlement, the parties entered into a release and contract of subrogation with regard to the further litigation remaining in Civil Action No. 220-71-R and the action herein. Those agreements have been filed in both actions.

The Court will address itself first to Stone & Webster's motion to dismiss.

Stone & Webster contends that INA is the proper party plaintiff and that as a result of the aforementioned settlement in Civil Action No. 220-71-R VEPCO has no remaining interest in the action herein. Accordingly, Stone & Webster argues that INA should be made the proper party plaintiff. If said contention were sustained, diversity jurisdiction would fail (both Westinghouse and INA are Pennsylvania corporations) under the complete diversity rule of *Strowbridge* v. *Curtiss,* 3 Cranch 267 (1806). [sic].

Prior to the VEPCO-INA settlement, Stone & Webster contended that INA, as a partial subrogee of VEPCO's total claim against the defendants, was a proper party plaintiff and in the least a "use plaintiff" which, pursuant to Rule 17(a), F.R.C.P., should prosecute the action. Similarly, if this contention were upheld and INA joined as a proper party plaintiff, diversity jurisdiction would fail.

In support of its contention that VEPCO is without further standing to prosecute this action, Stone and Webster has placed in the record the agreements appurtenant to the VEPCO-INA settlement. The *Instrument of Subrogation* thereto reads, *inter alia,* as follows:

> Now, in consideration of the payment by the Insurer to Vepco of the said sum of Two Million Sixty-two Thousand Four Hundred Twenty-eight ($2,062,-428.00) Dollars, in settlement of its liability under the insurance policy issued to Vepco, *Vepco hereby subrogates the Insurer to all of its remaining rights of recovery against Westinghouse Electric Corporation and/or Stone & Webster Engineering Corporation* (being those to which other insurers have not been previously subrogated) (See C.A. No. 5596-R) *for the losses and claims and damages resulting from an occurrence*

> *on January 22, 1967,* at its Mount Storm Power Station, Mt. Storm, West Virginia, which claims are more fully referred to and described in the various pleadings in the aforesaid Civil Action No. 220-71-R. (Emphasis supplied by the Court.)

In response VEPCO has asserted that said settlement while adding an additional $50,000 to its insurance recovery, still left it with a $150,000 balance of uninsured expenses arising from the Mt. Storm incident, the genesis of this exercise in pleading practice. VEPCO claims that its interest in this action is retained by virtue of said balance which it seeks to recover from the defendants. In support of its contention, VEPCO relies on its Agreement of Cooperation with INA which reads in part:

> (7) Vepco and I.N.A. further agree that counsel for I.N.A. shall represent its claims, if any, against Westinghouse and/or S. & W. for uninsured loss, claim for which is in the sum of $150,000.00, but it shall be under no obligation for costs and expenses incurred in the prosecution of such claims conjunctively with those to which I.N.A. is subrogated.

Although the above quoted language appears to contradict the Instrument of Subrogation, *supra,* the Court nevertheless concludes that VEPCO has retained a pecuniary interest and that standing is retained by virtue of its intent to recover the uninsured loss.

The question remains, therefore, whether INA, as a partial subrogee, should be joined herein.

The Court is offered guidance on this matter by a substantial body of case law, both in federal and Virginia courts. While questions of proper parties in federal courts are ultimately determined on the basis of federal rules and procedures, "state law questions may arise in determining

what interest the outsider actually has . . ." *Provident Bank* v. *Patterson,* 390 U.S. 102, 125 (1967); see Wright, *Federal Courts* (2d edition 1970), at 301. Accordingly, the Court relies in part on Virginia state law.

Stone & Webster contends, and the Court concurs, that a partial subrogee is a real party in interest. Both the Virginia Supreme Court of Appeals and the United States Supreme Court have upheld this principle. See *Brighthope Rwy. Co.* v. *Rogers,* 76 Va. 443 (1881); *U.S.* v. *Aetna Cas. & S. Co.,* 338 U.S. 366 (1949).

Plaintiff concedes that this principle of law may in fact be correct, but nevertheless asserts that defendant has (1) no right to either demand that the action be brought by the subrogee, or (2) to compel joinder. As authority for the first proposition, plaintiff cites *Matthews* v. *Allstate Ins. Co.,* 194 F. Supp. 459 (1881), [sic], and *Miller* v. *Tomlinson,* 194 Va. 367 (1952), both of which deal with § 8-94 Va. Code 1950. That section allows assignees or beneficial owners of claims to sue in their own names, and the cited cases reflect that the section is designed to benefit assignees and not to allow defendants to compel suit by certain plaintiffs. The Court concludes, however, that the issue is properly one of joinder under Rule 19, F.R.C.P., and as a procedural issue, federal law ultimately governs. *Provident Bank, supra,* at 125, f.n. 22.

The Court's determination that INA is a real party in interest is not determinative of the joinder issue per se:

> Once the requirements of Rule 17 have been complied with, and it has been decided that a particular individual or entity is a party in interest with capacity to sue or be sued, it is necessary to go one more step and decide whether the person has such a strong interest in the litigation that his joinder ought to be compelled. Wright, *Federal Courts,* (2d ed.) at 296.

The guidelines for compelling joinder are set forth in Rule 19, F.R.C.P.

Rule 19

Joinder Of Persons Needed For Just Adjudication

(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.
(b) Determination by Court Whenever Joinder not Feasible. If a person as described in subdivision (a) (1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment

> rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.
>
> * * *

The broad discretion afforded the trial courts under Rule 19 to fashion appropriate remedy has been approved in *Provident Bank, supra.* This Court is thus left to "balance the equities" in disposing of this matter. Again the Court finds Wright, *supra,* helpful:

> If the absentee is needed for just adjudication and is not subject to process or his joinder would destroy diversity, Rule 19(b) states the factors to be considered in deciding whether to proceed in his absence or to dismiss the action. The ultimate question is whether "equity and good conscience" permit the action to proceed, but in deciding this the court is required to weigh whether judgment in the absence of the person would prejudice him or those already parties, what protective provisions in the decree might lessen or avoid this prejudice, whether a judgment rendered in the person's absence will be adequate, and whether the plaintiff will have a satisfactory remedy if the action is dismissed.

This Court finds that nonjoinder will not prejudice the parties as all interests are represented by the present parties. There is some question, however, as to whether nonjoinder will expose the defendants to double claims. That issue arises by virtue of the present status of Civil Action No. 220-71-R.

In that action, VEPCO sued INA for the balance owing on the insurance payout. INA filed a third party complaint against Stone & Webster and Westinghouse alleging essentially the same causes of action as those set forth by the plaintiff herein. The settlement consummated in Civil Action No. 220-71-R left only the third party causes of

action, which causes Stone & Webster has moved to dismiss. That motion is now under advisement pending the submission of further memoranda.

At this juncture the Court is disposed, under the Rule 19 standards, to permit prosecution of the action herein. Any danger of double claims will be appropriately weighed by the Court in its final disposition of the motion to dismiss now pending in Civil Action No. 220-71-R. Suffice it to say that INA's interest is now represented in these actions as a partial subrogee.

The overriding factor in the Court's discretionary refusal to compel joinder is the Court's conclusion that the parties have a right to a forum in which to settle their controversies. While the parties may possibly begin re-litigation of the matters herein in Pennsylvania courts, problems of jurisdiction over the non-state parties, VEPCO and Stone & Webster, who are essential to the litigation, may render such efforts fruitless or ineffectual. This conclusion follows from the fact that the case is essentially interstate in character. Joinder of INA will therefore not be compelled. Accordingly, the motion to dismiss on the ground of lack of diversity jurisdiction must be denied.

INA's motion to consolidate the cases will be kept under advisement until a ruling be made on the motions to dismiss now pending in Civil Action No. 220-71-R.

The remaining motions may be disposed of with little comment.

Stone & Webster's motion based on an alleged failure to state a cause of action, will be denied, for examination of the complaint reveals sufficient content to put the alleged causes of action in issue.

The motions by Stone & Webster and Westinghouse to dismiss by reason of VEPCO having allegedly split its

causes of action will likewise be denied. A similar motion to this effect was filed with the Court on April 29, 1970, and the reasons stated by the Court at that time are no less viable now.[1]

An appropriate order shall issue.

/s/ Robert R. Merhige, Jr.
United States District Judge

Date: 11-3-72

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[1] See the Court's order of February 1, 1971.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

CIVIL ACTION NO. 147-69-R

VIRGINIA ELECTRIC AND POWER COMPANY,
WHO SUES FOR THE USE AND BENEFIT OF
INSURANCE COMPANY OF NORTH AMERICA

v.

WESTINGHOUSE ELECTRIC CORPORATION and
STONE & WEBSTER
ENGINEERING CORPORATION

ORDER

Filed November 3, 1972

In accordance with the memorandum of the Court this day filed, and deeming it just and proper so to do, it is Adjudged and Ordered that:

1. The motion on behalf of Stone & Webster to dismiss for lack of diversity jurisdiction be, and the same is hereby, denied.

2. The motion on behalf of Stone & Webster to dismiss for failure to state a claim upon which relief can be granted be, and the same is hereby, denied.

3. The motions on behalf of Stone & Webster and Westinghouse to dismiss on the ground that Vepco split its cause of action be, and the same are hereby, denied.

4. The motion on behalf of INA to consolidate C.A. 220-71-R with the action herein is taken under advisement.

Let the Clerk send copies of the memorandum and this order to counsel of record.

/s/ Robert R. Merhige, Jr.
United States District Judge

Date: 11-3-72

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

CIVIL ACTION 147-69-R

VIRGINIA ELECTRIC AND POWER CO., ETC.

v.

WESTINGHOUSE ELECTRIC CORPORATION

AND

STONE & WEBSTER
ENGINEERING CORPORATION

ORDER

Filed November 10, 1972

It has come to the Court's attention that counsel for Westinghouse intended that the tenth defense of its Answer herein be treated as a motion to dismiss. Deeming it just and proper so to do, it is ORDERED that:

1. Said defense shall be deemed by this Court as a motion to dismiss.

3. For the reasons stated in the memorandum of the Court dated November 3, 1972, said motion is denied.

Let the Clerk send copies of this order to all counsel of record.

/s/ Robert R. Merhige, Jr.
United States District Judge

Date: November 10, 1972

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

CIVIL ACTION 147-69-R

VIRGINIA ELECTRIC AND POWER COMPANY, ETC.

v.

WESTINGHOUSE ELECTRIC CORPORATION, ET AL

ORDER

Filed November 21, 1972

Defendants Westinghouse and Stone and Webster have moved the Court to amend its order of November 3, 1972, to include a statement that the Court finds that the determination therein involves a controlling question of law as to which there is a substantial ground for difference of opinion, and that an immediate appeal from the order may materially advance the ultimate termination of the litigation; and further, that upon said ground that the Court certify the matters therein for interlocutory appeal pursuant to 28 U.S.C. § 1292.

It appearing that the ends of justice might best be served thereby, and deeming it just and proper so to do, it is so ORDERED.

Let the Clerk send copies of this order to all counsel of record.

/s/ Robert R. Merhige, Jr.
United States District Judge

Date: November 21, 1972

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 72-8035, 72-8036

Virginia Electric and Power Company, who sues for the use and benefit of Insurance Company of North America

Appellant [sic]

versus

Westinghouse Electric Company [sic] and Stone & Webster Engineering Corporation

Appellee [sic]

ORDER GRANTING APPEAL

Filed January 8, 1973

In this diversity action an interlocutory appeal is sought pursuant to 28 U.S.C. § 1292b. The question was properly certified by the district court below.

The district court order appealed from is a determination of proper parties under Fed. R. Civ. P. 17 & 19. Should the district court determination be reversed, the jurisdiction of the district court would fall for lack of complete diversity. Thus this is the type of interlocutory appeal which might avoid protracted and expensive litigation. *See United States Rubber Co.* v. *Wright,* 359 F.2d 784 (9th Cir. 1966).

Also the question certified is one as to which there is a substantial ground for difference of opinion. A result opposite from that below was reached in *Potomac Elec. Power*

Co. v. *Babcock & Wilcox Co.*, 54 F.R.D. 486 (D. Md. 1972).

The requirements of 28 U.S.C. § 1292b having been satisfied, the petition for an interlocutory appeal will be granted.

For the Court

/s/ J. Braxton Craven, Jr.
United States Circuit Judge

28 UNITED STATES CODE §1332

Diversity Of Citizenship; Amount In Controversy; Costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State, and foreign states or citizens or subjects thereof; and

(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business: *Provided further,* That in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business.

(d) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico, June 25, 1948, c. 646, 62 Stat. 930; July 26, 1956, c. 740, 70 Stat. 658; July 25, 1958, Pub.L. 85–554, § 2, 72 Stat. 415; Aug. 14, 1964, Pub.L. 88–439, § 1, 78 Stat. 445.

Vol. 7 U.S.C. at pp. 7566-67 (1970 ed.)

FEDERAL RULES OF CIVIL PROCEDURE

28 United States Code Appendix—Rules Of Civil Procedure For The United States District Courts—Rule 17
Vol. 7 U.S.C. App. at p. 7756 (1970 ed.)

Rule 17. *Parties Plaintiff and Defendants; Capacity*

(a) *Real Party in Interest.* Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute of the United States so provides, an action for the

use or benefit of another shall be brought in the name of the United States. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

(b) *Capacity to Sue or be Sued.* The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held, except (1) that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States, and (2) that the capacity of a receiver appointed by a court of the United States to sue or be sued in a court of the United States is governed by Title 28, U.S.C. §§ 754 and 959(a).

(c) *Infants or Incompetent Persons.* Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. If an infant or incompetent person does not have a duly appointed representative he may sue by his next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent

person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.

FEDERAL RULES OF CIVIL PROCEDURE

28 United States Code Appendix—Rules Of Civil Procedure For The United States District Courts—Rule 19
Vol. 7 U.S.C. App. at p. 7758 (1970 ed.)

Rule 19. *Joinder of Persons Needed For Just Adjudication*

(a) *Persons to be Joined if Feasible.* A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) *Determination by Court Whenever Joinder not Feasible.* If a person as described in subdivision (a) (1)–(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The

factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) *Pleading Reasons for Nonjoinder.* A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a) (1)–(2) hereof who are not joined, and the reasons why they are not joined.

(d) *Exception of Class Actions.* This rule is subject to the provisions of Rule 23.

SUBROGATION RECEIPT

January 16, 1968

Received of the Insurance Company of North America Insurance Co., the total sum of One Million Nine Hundred Ninety thousand and 00/100 Dollars ($1,990,000.00) in full settlement of all claims and demands of the undersigned for loss and damage by electrical fault and Supplemental & Partial mechanical breakdown occurring on the 22nd day of January A.D. 1967, to the property described in Policy No. CX 10X196 issued through the Davenport Agency of said Company.

In consideration of and to the extent of said payment the undersigned hereby subrogates said Insurance Company, to all of the rights, claims and interest which the undersigned may have against any person or corporation liable for the

loss mentioned above, and authorizes the said Insurance Company to sue, compromise or settle in the undersigned's name or otherwise all such claims and to execute and sign releases and acquittances and endorse checks or drafts given in settlement of such claims in the name of the undersigned, with the same force and effect as if the undersigned executed or endorsed them.

Warranted no settlement has been made by the undersigned with any person or corporation against whom a claim may lie, and no release has been given to anyone responsible for the loss, and that no such settlement will be made nor release given by the undersigned without the written consent of the said Insurance Company and the undersigned covenants and agrees to cooperate fully with said Insurance Company in the prosecution of such claims, and to procure and furnish all papers and documents necessary in such proceedings and to attend court and testify if the Insurance Company deems such to be necessary but it is understood the undersigned is to be saved harmless from costs in such proceedings.

In Witness Whereof he has hereto set his hand and seal this 16th day of January 1968.

Witness:

.....

.....

..... (L.S.)

Virginia Electric & Power Company

By /s/ G. A. Spencer—Treasurer

(Notarization to be completed on losses where local law requires it.)

For Individuals

State of Virginia
City of Richmond ss:

On the ..... day of ....., 19..... before me came .....to me known to be the individual described in, and who executed, the foregoing instrument, and acknowledged that ..... executed the same.

Exhibit A

.....

Notary

For Corporations

State of
County of ss:

On the 16th day of January, 1968 before me came ..... to me known, who, being by me duly sworn, did depose and say that he resides in Richmond, that he is the Treasurer of Virginia Electric & Power Co. the corporation described in, and which executed, the foregoing instrument; that he knows the seal of said corporation, that the seal, affixed to said instrument is such corporate seal; that is was so affixed by order of the Board of Directors of said corporation; and that he signed his name thereto by like order.

/s/ Illegible

Notary

CERTIFICATE OF SERVICE

I, James L. Sanderlin, one of the attorneys for Westinghouse Electric Corporation, a petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 28th day of December, 1973, I served copies of the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit in the foregoing action on the several parties thereto, as follows:

(1) On the Insurance Company of North America, by mailing three copies of the same in a duly addressed envelope, with postage prepaid, to Edward A. Marks, Esq., Sands, Anderson, Marks & Clarke, 1420 Fidelity Building, Ninth & Main Streets, Richmond, Virginia 23219.

(2) On Stone & Webster Engineering Corporation, by mailing three copies of the same in a duly addressed envelope, with postage prepaid, to Charles W. Laughlin, Esq., Christian, Barton, Parker, Epps & Brent, 1200 Mutual Building, Richmond, Virginia 23219.

(3) On the Virginia Electric and Power Company, by mailing three copies of the same in a duly addressed envelope, with postage prepaid, to Edward A. Marks, Esq., Sands, Anderson, Marks & Clarke, 1420 Fidelity Building, Ninth and Main Streets, Richmond, Virginia 23219, and by mailing three informational copies of the same in a duly addressed envelope, with postage prepaid, to James E. Farnham, Esq., Hunton, William, Gay and Gibson, 700 East Main Street, Post Office Box 1535, Richmond, Virginia 23212.

/s/ JAMES L. SANDERLIN
JAMES L. SANDERLIN
Attorney for Westinghouse Electric Corporation
McGuire, Woods & Battle
1400 Ross Building
Richmond, Virginia 23219

COURT, U. S.
JAN 28
MICHAEL RODA

In The

Supreme Court of the United States

October Term, 1973

No. 73-1013

STONE & WEBSTER ENGINEERING CORPORATION,
Petitioner,

v.

VIRGINIA ELECTRIC & POWER COMPANY,
WHO SUES FOR THE USE AND BENEFIT OF
INSURANCE COMPANY OF NORTH AMERICA,
Respondent.

AND

No. 73-1014

WESTINGHOUSE ELECTRIC CORPORATION,
Petitioners,

v.

VIRGINIA ELECTRIC AND POWER COMPANY,
WHO SUES FOR THE USE AND BENEFIT OF
INSURANCE COMPANY OF NORTH AMERICA,
Respondent.

BRIEF IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

EDWARD A. MARKS, JR.
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Counsel for Virginia Electric and Power Company who sues for the use and benefit of Insurance Company of North America

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In The

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No. 73-1013

STONE & WEBSTER ENGINEERING CORPORATION,
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Petitioners,

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VIRGINIA ELECTRIC AND POWER COMPANY,
WHO SUES FOR THE USE AND BENEFIT OF
INSURANCE COMPANY OF NORTH AMERICA,
Respondent.

BRIEF IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Respondent respectfully urges that the two above petitions are not well taken, that the opinion below is plainly correct, and that no writ of certiorari should be issued on either petition. Our presentation will be addressed to both petitions without distinction between them.

REASONS FOR DENYING THE WRIT

I.

The Fourth Circuit's Decision Does Not Conflict With Previous Decisions Of The Supreme Court Or With The Interpretations Given To Rules 17(a) And 19, Federal Rules Of Civil Procedure.

Counsel for Virginia Electric and Power Company (hereinafter VEPCO) believe that their legal arguments, for the most part, are adopted, amply set out and even expanded upon somewhat in the opinions of the district court and the court of appeals. These opinions are included in the appendices of the petitioners' briefs when reference to them is needed. In view of this fact, counsel will attempt to limit argument now as provided in U.S. Sup. Ct. Rules 19 and 24, 28 U.S.C.

The decision of the circuit court in the case at bar in no way conflicts with the decision of this Court in *United States* v. *Ætna Cas. & Surety Co.*, 338 U.S. 366 (1949). The *Ætna* cases (there were four on appeal encompassing varied factual situations) arose under the Federal Tort Claims Act (28 U.S.C. §§ 1346(b) and 2674) as suits by partially or fully subrogated insurance companies against the United States. These insurer subrogees were seeking the damages suffered by the subrogor at the hands of government employees. The United States asserted two defenses to prevent these suits by subrogees:

(1) attacking the subrogation arrangement under the dictates of the Anti-Assignment Act (31 U.S.C. § 203) (an act designed to prevent assignments for the purpose of influence peddling) and

(2) saying that the insurer was not a real party in interest under Rule 17(a) Fed. R. Civ. P.

There was no possibility that diversity would be destroyed because of the insurers' citizenships since the Federal Tort Claims Act provides that the federal courts shall have *exclusive jurisdiction* of all such suits. The *Ætna* Court held that transfers by operation of law, such as subrogation, do not fall within the category of evils which the Anti-Assignment Act was designed to prevent. Further, the Court found that the insurers and the insureds were both real parties in interest under Rule 17(a) and could pursue their claims in their own names as necessary parties. At this point, in the opinion, though the Court was not really called upon to say more, it went on to explain in a footnote that the insured on the one hand, and the insurer on the other were ". . . clearly not 'indispensable' parties . . ." in an action brought by the other. *Ætna, supra,* at 382 n. 19. Also the Court recognized that joinder of these parties could not be determined solely by Rule 17(a) but that 17(a) must necessarily be reconciled with Rule 19(b) Fed. R. Civ. P. *Id.* at 382. This homage by the Court to Rule 19 cannot be fully appreciated unless one realizes that *Ætna* was decided in 1949, long before the 1966 Revision to Rule 19 relaxed the joinder requirements. See App. p. 4. Since this 1966 Revision and the decision of this Court in *Provident Tradesmens Bank & Trust Co.* v. *Patterson,* 390 U.S. 102 (1968), the courts are allowed far more latitude as to joinder and as to the practical considerations to be weighed in making the joinder decision. See Westinghouse App. pp. 9-12.

The *Ætna* Court fully realized that in suits against the United States under the Tort Claims Act, there would be cases in which the government could be subjected to multiple actions. 338 U.S. at 382. This drawback was regrettable and was not cited as the preferred and most economical policy for court administration—the desired policy, of course, being the avoidance of a multiplicity of suits. Never-

theless, Westinghouse seizes upon this language in *Ætna* in an effort to split the one federal action before this Court into a Medusa's head of state actions. All along Westinghouse and Stone & Webster have been arguing that the fear of double claims is what made them seek joinder of Insurance Company of North America (hereinafter INA). No wonder the opinion below dealt with multiple claims. This is what the petitioners have previously advanced as their key to dismissal. They now wish to construe to their ends a dissertation by the court below on multiple claims, the petitioners, themselves, elicited. Their intentions now in urging the opposite result are tainted with motives that are more obstructionistic than they are genuine examples of the quest for a forum to decide the issues. By this effort to appeal from an interlocutory appeal, the petitioners are grasping for yet another decision point to postpone the day of reckoning when the merits of the case must be dealt with. The *Provident* Court understood the objecting party's reasoning and disapproved of it in the following passage. "Its [the party objecting to non-joinder] only concern with the absence of Dutcher [the non-diverse party sought to be joined] was and is to obtain a windfall escape from its defeat at trial." *Provident, supra* at 112. As indicated by the Fourth Circuit, respondent would be left with no way to pursue its entire claim, which is essentially interstate in character, if the present action is not allowed to continue. See Westinghouse App. p. 12.

This factor of an alternate remedy is just one of the concerns of Rule 19, along with the multiple claims which the court below considered in making its decision. It is obvious from the Fourth Circuit's opinion that it weighed all the factors set out in Rule 19 and that the decision was not based solely on eradicating the dangers of double liability. See Westinghouse App. pp. 11-12.

Westinghouse in its petition at page 6 says that the court of appeals "disregarded" Rule 17(a) and, by their "avoiding" it, escaped the workings of *Strawbridge* v. *Curtiss,* 3 Cranch 267 (1806). A mere perusal of the opinion below discloses that this charge is not well founded. See Westinghouse App. p. 8 n. 13. What the court did was to begin its examination of the problem of joinder by reference to Rule 17. When the court reached the impasse which Rule 17 presents when it indicates joinder of a reluctant or nondiverse party, it looked, as it must, to Rule 19. Under Rule 19, the court of appeals meticulously satisfied itself that no undeserved harm would fall on Westinghouse and Stone & Webster by allowing the district court's decision to stand and the action to continue without joinder of INA. But Westinghouse and Stone & Webster seem to consider Rule 17 to be procedural Rosetta Stone to be used in the decipherment of legal conundrums, without reference to and quite apart from the other rules of procedure and decisions interpreting them. The Fourth Circuit correctly refused to read Rule 17 in a vacuum and thereby reach the absurd results foisted on this Court by Westinghouse and Stone & Webster. See Westinghouse App. p. 9.

Charles Alan Wright in his treatise describes the procedure which is required under the rules.

> Once the requirements of Rule 17 have been complied with, and it has been decided that a particular individual or entity is a party in interest with capacity to sue or be sued, it is necessary to go one more step and decide whether the person has such a strong interest in the litigation that his joinder ought to be compelled. C. Wright, Law of Federal Courts, (1970 ed.) at 296.

The author in an expanded work goes on to say that

> . . . the question of who should or may be joined in

> the action must be determined under Rule 19 and Rule 20 rather than Rule 17(a). [*Watsontown Brick Co.* v. *Hercules Powder Co.*, 201 F. Supp. 343 (M.D. Pa. 1962); *Morelli* v. *Northwest Engineering Corp.*, 30 F.R.D. 522 (E.D. Wisc. 1962)] C. Wright & A. Miller, Federal Practice and Procedure: Civil § 1543 at 646 (hereinafter cited as *Wright & Miller*).

Another commentator concludes:

> [i]n sum, Rule 17(a) should not be read as an absolute exception which allows exclusion or compels joinder apart from Rule 19. Perhaps the inconsistencies between Rule 17(a) and 19 could best be reconciled by restating Rule 17(a) as a permissive joinder rule. Kennedy, *Federal Rule 17(a); Will the Real Party in Interest Please Stand?*, 51 Minn. L. Rev. 675, 680 (1967).

Thus it is clear that when the limited purpose of Rule 17 has been fulfilled, the courts must, as did the district and circuit courts below, apply the practical solutions provided by Rule 19 and expounded upon by this Court in the *Provident* case. See Westinghouse App. p. 9.

II.

The Fourth Circuit's Decision Does Not Conflict With The Decisions Of The Other Circuit Courts.

Westinghouse cites *Sunray Oil Corp.* v. *Allbritton*, 187 F.2d 475 (1951) as an example of further conflict with the decision below. *Sunray* involved a suit by a worker Allbritton against a contractor Sunray, on whose oil derrick Allbritton was injured while in the scope of his employment in Texas with an independent contractor. Allbritton was partially compensated for his injuries pursuant to the Texas Workmen's Compensation Insurance carried by his em-

ployer, the independent contractor. The workmen's compensation carrier attempted by agreement with Allbritton (without joining with him in the suit and, in fact, refusing to join therein) to have him recover its portion of the claim against the contractor. The carrier sought this relief under the theory that Allbritton was its trustee (as provided in Rule 17) for the recovery of the compensation paid to him. There was no mention of any diversity problem. In rejecting this argument and holding that the judgment be reduced by the amount of the carrier's claim, the court in the following language referred to the substantive state rights created. ". . . [I]t is now settled by the Texas law that the employee's right to recover against third persons is limited to damages in excess of the compensation paid to him." *Sunray, supra* at 477.

Counsel for VEPCO certainly do not contend that one who does not have the substantive right to sue may maintain an action, but the Fourth Circuit in its opinion properly found that

> . . . VEPCO, as subrogor, is entitled under the substantive law [of Virginia] to bring suit for its entire loss. VEPCO, being entitled to enforce the right, may bring their action even though INA will ultimately receive the major portion of any recovery. See Westinghouse App. p. 7.

Though interpretation of the substantive law of Virginia is not the proper subject of this brief, counsel felt constrained by Westinghouse's misplaced reliance on *Sunray* to provide at least the short rejoinder above.

In addition to the factual and substantive law differences between *Sunray* and the case before this Court, there are later opinions by the Fifth Circuit Court of Appeals which illustrate that court's understanding that the law of the

forum governs what claims may properly be pursued and by whom. *Peoples Loan & Finance Corp.* v. *Lawson*, 271 F.2d 529 (5th Cir. 1959) (distinguishing *Ætna*); *Celanese Corp.* v. *John Clark Indus., Inc.*, 214 F.2d 551 (5th Cir. 1954); see Westinghouse App. p. 10 n. 17. The Fifth Circuit's view does not clash with the principles stated by the Fourth Circuit in the case at bar. Moreover, there is no indication that the Fifth Circuit is or was confused, even at the time of its 1951 *Sunray* decision, in its approach to the problems of joinder or non-joinder of a real party in interest.

Just as *Sunray* is distinguishable on its facts and law, so are the rest of the cases cited by Westinghouse for the proposition that Rule 17(a) must be read apart from the other rules.[1] Broadly, these cases can be distinguished by the fact that none of them deals with an absent party whose joinder would destroy diversity. Thus the workings of Rule 19 are not called into play. The decisions themselves reflect their limited application. In *Gas Service Co.* v. *Hunt*, 183 F.2d 417 (10th Cir. 1950) the court held that ". . . *with certain exceptions* not having material bearing here, upon timely motion of the alleged wrongdoer, the . . . [insurer subrogee] should be joined as a party." *Id.* at 419 (emphasis added). This is an obvious reference to the fact that no diversity problems existed in joining the insurer and this was in 1950 before the revision to Rules 17(a) and 19! The decision in *City Stores Co.* v. *Lerner Shops, Inc.*, 410 F.2d 1010 (D.C. Cir. 1969) cited by Westinghouse is even less persuasive. Not only was there no diversity quandary in *Lerner*, but it also was a case of full subrogation.

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[1] *Gas Service Co.* v. *Hunt*, 183 F.2d 417 (10th Cir. 1950); *City Stores Co.* v. *Lerner Shops, Inc.*, 410 F.2d 1010 (D.C. Cir. 1969); *Askey* v. *C & M Service*, 45 F.R.D. 242 (M.D. Pa. 1968); *Northboro Apartments, Inc.* v. *Wheatland Tube Co.*, 198 F. Supp. 245 (E.D. Pa. 1961); *McWhirter* v. *Otis Elevator Co.*, 40 F. Supp. 11 (W.D. S.C. 1941).

III.

Nominal Parties, Collusion And Ratification.

Stone & Webster attempts to gain the attention of this Court through the introduction of a line of cases dealing with nominal parties and diversity. Stone & Webster Petition pp. 5-6. A reading of these cases reveals that the nominal parties concerned are administrators, governors, justices of the peace, trustees and other uninterested functionaries, acting in their official capacities as provided by state and federal law. It is through these functionaries—legal fictions really—that the substantive interest of the aggrieved party may be pursued. VEPCO as a partial subrogor is not such a nominal party, since it is the repository of the legal right of action, has a substantial claim in its own right and is the foundation upon which rests the claim of any subrogee. See Westinghouse App. p. 7 text and n. 9.

In a like manner, Stone & Webster attempts to raise the ugly head of collusion in alluding to this Court's decision in *Kramer* v. *Caribbean Mills, Inc.*, 394 U.S. 823 (1969), holding invalid a collusive assignment to create diversity jurisdiction. There has never been any collusive assignment presented which could lead to the mention of collusion as an issue in the case at bar. Subrogation in Virginia comes about by operation of law. The fact that VEPCO and INA formalized this basic principle does not make it any less valid. See Westinghouse App. p. 7 n. 9.

Rule 17(a) itself provides yet another procedure by which the protestations of the petitioners may be calmed. By amendment in 1966 the following sentence was added to Rule 17(a).

> No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for *ratification* of commencement of the action by, or

> joinder or substitution of, the real party in interest; and such ***ratification,*** joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest. Rule 17(a) Fed. R. Civ. P. (emphasis added).

Ratification has been approved by the courts and included in *Wright & Miller* as a viable alternative to joinder. *Wright & Miller* provide this background and explanation:

> Formal joinder or substitution of the real party in interest will not be necessary when he ratifies the commencement of the action. The reference to "ratification" in Rule 17(a) seems to be a carryover from the original draft of the sentence added in 1966, which was to apply only to certain maritime proceedings, and probably was intended to adopt the procedure in salvage actions by which non-parties seek their share of the recovered property. Nonetheless, some federal courts have interpreted the words to validate an arrangement by which the real party in interest authorizes the continuation of an action brought by another and agrees to be bound by its result, thereby eliminating any risk of multiple liability. [*Southern Nat. Bank of Houston, Tex.* v. *Tri Financial Corp.*, 317 F. Supp. 1173, 1186 (S.D. Tex. 1970)] *Wright & Miller* § 1555 at 709.

Knowing that INA had ratified and agreed to be bound by any decision in the case at bar, the Fourth Circuit lent its weight to the ratification solution in observing that ". . . the subrogee may agree to be bound by the judgment . . ." and thus satisfy the requirements of Rule 17. See Westinghouse App. p. 9 n. 15; *Urrutia Aviation Enterprises, Inc.* v. *B. B. Urson & Assoc.*, 406 F.2d 769 (5th Cir. 1969).

CONCLUSION

Westinghouse and Stone & Webster urge what they term "reality" on this Court. In fact it is VEPCO which has

made full voluntary disclosure of the interests of INA and confronted the courts with the realities. Reality here is that both the petitioners, though only one shares citizenship with INA, are trying to frustrate the greater part of a claim which has been lodged against them. Petitioners say this maneuver is justified because part of the loss, it is alleged they caused, was insured by a non-diverse company to Westinghouse. This accident of insurance should not be allowed to impede an action essentially interstate in character—an action which was begun in 1967 and can now be ended once and for all in federal court or, failing that, probably not at all at this late date.

As demonstrated no conflict exists between the decision below and the decisions of this Court or between the decision below and those of any of the courts of appeals. Nor was the interpretation given to Rules 17(a) and 19 by the Fourth Circuit incorrect. Nor did the Court "disregard" or "avoid" Rule 17. In short, the Fourth Circuit was plainly right in upholding the decision of the district court.

For these reasons the writ of certiorari should be denied.

Respectfully submitted,

VIRGINIA ELECTRIC AND POWER COMPANY who sues for the use and benefit of Insurance Company of North America

By Counsel

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APPENDIX

FEDERAL RULES OF CIVIL PROCEDURE

Rule 17

Parties Plaintiff And Defendant; Capacity

(a) Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action has been commenced in the name of the real party in interest.

(b) Capacity to Sue or be Sued. The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held, except (1) that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United

States, and (2) that the capacity of a receiver appointed by a court of the United States to sue or be sued in a court of the United States is governed by Title 28, U.S.C. §§ 754 and 959(a).

(c) Infants or Incompetent Persons. Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. If an infant or incompetent person does not have a duly appointed representative he may sue by his next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person. As amended Dec. 27, 1946, Dec. 29, 1948, eff. Oct. 20, 1949; Feb. 28, 1966, eff. July 1, 1966.

1949 Amendment

Deleted the words "Rule 66" at the end of subdivision (b) and substituted "Title 28, U.S.C., §§ 754 and 959(a)."

1966 Amendment

Inserted in subdivision (a) the word "bailee"; and added the third sentence.

Rule 19

Joinder Of Persons Needed For Just Adjudication

(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1)

in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) Determination by Court Whenever Joinder not Feasible. If a person as described in subdivision (a) (1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) Pleading Reasons for Nonjoinder. A pleading asserting a claim for relief shall state the names, if known to the

pleader, of any persons as described in subdivision (a) (1)-(2) hereof who are not joined, and the reasons why they are not joined.

(d) Exception of Class Actions. This rule is subject to the provisions of Rule 23.

1966 Amendment

Gave the rule its present wording. Prior thereto the rule provided:

"*(a) Necessary Joinder.* Subject to the provisions of Rule 23 and of subdivision (b) of this rule, persons having a joint interest shall be made parties and be joined on the same side as plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so, he may be made a defendant or, in proper cases, an involuntary plaintiff.

"*(b) Effect of Failure to Join.* When persons who are not indispensable, but who ought to be parties if complete relief is to be accorded between those already parties, have not been made parties and are subject to the jurisdiction of the court as to both service of process and venue and can be made parties without depriving the court of jurisdiction of the parties before it, the court shall order them summoned to appear in the action. The court in its discretion may proceed in the action without making such persons parties, if its jurisdiction over them as to either service of process or venue can be acquired only by their consent or voluntary appearance or if, though they are subject to its jurisdiction, their joinder would deprive the court of jurisdiction of the parties before it; but the judgment rendered therein does not affect the rights or liabilities of absent persons.

"*(c) Same: Names of Omitted Persons and Reasons for Non-Joinder to be Pleaded.* In any pleading in which relief

is asked, the pleader shall set forth the names, if known to him, of persons who ought to be parties if complete relief is to be accorded between those already parties, but who are not joined, and shall state why they are omitted."

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing brief and appendix were delivered to James L. Sanderlin, Esquire, McGuire, Woods & Battle, 1400 Ross Building, Richmond, Virginia 23219, counsel for petitioner, Westinghouse Electric Corporation and three copies were delivered to Charles W. Laughlin, Esquire, Christian, Barton, Parker, Epps & Brent, 1200 Mutual Building, Richmond, Virginia 23219, counsel for petitioner, Stone & Webster Engineering Corporation, on or before January 28, 1974.

I further certify that I am a member of the Bar of the Supreme Court of the United States, and that all parties required by law to be served have been served.

EDWARD A. MARKS, JR.
Of Counsel for Respondent

SUPREME COURT, U. S.
FEB 11 19
MICHAEL RODAK, JR.

In The

Supreme Court of the United States

October Term, 1973

No. 73-1014

WESTINGHOUSE ELECTRIC CORPORATION,
Petitioner,

v.

VIRGINIA ELECTRIC AND POWER COMPANY
WHO SUES FOR THE USE AND BENEFIT OF
INSURANCE COMPANY OF NORTH AMERICA,
Respondent.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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REPLY TO NEW MATTERS RAISED IN THE BRIEF IN OPPOSITION

The issue in this case is clearly and simply whether the Insurance Company of North America may avoid the requirement of complete diversity of citizenship by avoiding the requirements of Rule 17(a), Federal Rules of Civil Procedure, and by invoking the provisions of Rule 19, Federal Rules of Civil Procedure.

This action was instituted by the Insurance Company of North America (hereinafter INA), in the name of Virginia Electric and Power Company (hereinafter Vepco), for the use and benefit of INA. In its answer to the com-

plaint herein, Westinghouse denied the existence of federal jurisdiction. Moreover, Westinghouse asserted, as its Tenth Defense, that INA was the real party in interest to the extent of its payment to Vepco and that INA must prosecute its claim in its own name or have the amount of its claim dismissed from this action. Even though INA was notified of this jurisdictional defect, it made no attempt to file its claim in a proper forum, and indeed, at a hearing conducted in the trial court on July 24, 1972, INA conceded that it was willing to run the risk of a lack of jurisdiction in hopes of keeping the case in the federal court.

The transcript of the hearing on July 24, 1972, Record Volume III, at pages 12 and 14 shows the following colloquy:

* * *

> Mr. Laughlin: A short time ago, a relatively short time ago, I think it was a matter of months or weeks, but during that stay period I personally was advised for the first time, and I think it appears in a pleading that was filed, that the citizenship of the Insurance Company of North America, and that of Westinghouse, was in fact the same.
>
> * * *
>
> That being true, we have a non-diverse case and the case should be taken off the docket.
>
> The Court: All right, sir. Thank you. Mr. Marks, do you wish to reply briefly?
>
> Mr. Marks: Yes, sir, I do, with the assistance of Mr. Orgain.

The Court: If Mr. Laughlin's position is correct then there simply isn't any jurisdiction. Do you want to run that risk?

Mr. Marks: Yes, sir, I do.

* * *

INA's decision to accept this risk, and both decisions below, appear to have their genesis in the conception of the effect of Rule 17 enunciated by Professor Charles A. Wright. That conception is best reflected in Professor Wright's statement that in the case of partial subrogation "[a]s in the case of partial assignment, the action will not be dismissed if the missing person cannot be joined because its presence would destroy diversity if his claim fails to meet the jurisdictional amount unless it is determined under Rule 19 that he should be regarded as indispensable." Wright & Miller, Federal Practice and Procedure: Civil § 1546 at 661.

This statement of the law is only partially true and cannot be relied upon to support the decisions of the lower courts. An examination of the authorities cited by Professor Wright in support of that statement clearly demonstrates why.

The first authority cited in support of the statement is this Court's decision in *United States* v. *Aetna Cas. & Sur. Co.*, 338 U.S. 366 (1949). An examination of *Aetna* is set forth in Westinghouse's Petition for Writ of Certiorari and will not be repeated here. Professor Wright also cites *Standard Accident Ins. Co.* v. *Lohman*, 295 F.2d 261 (7th Cir. 1961) in support of this statement.

However, *Lohman* holds that in cases of partial subrogation both the insured and the insurer are real parties in interest. Finding that both were real parties in interest, the Court then held that both the insured and the insurer should

be joined on the same side as plaintiffs or defendants and that "proper alignment of parties on such joinder would destroy the necessary diversity and require dismissal of the action." *Id.* at 264.

In *Lohman,* the insurer, Standard Accident Insurance Company, filed suit against Lohman, a sheriff, seeking damages for the alleged false and fraudulent return of a summons served on Standard's insurer, Groth, in a personal injury suit. A default judgment in the amount of $18,500 had been entered against Groth in the personal injury action. Groth sued Standard and ultimately received judgment against Standard for $17,500. Standard then sued Lohman to recover $17,500 plus attorneys' fees and expenses on the theory that Lohman had executed a false return of service on Groth in the personal injury suit. The appeal involved two issues, one of which was:

> "Whether, if plaintiff's [Standard] rights are merely those of a partial subrogee, it may maintain its action against defendants without joining Groth [the insured], and, if not, would such joinder destroy diversity jurisdiction?" *Id.* at 263.

The court, finding that the insurer had not paid the insured the full amount of the judgment or his attorneys' fees and expenses, held that if Standard was to assert any rights as its insured's subrogee, the insured must be joined as an indispensable party and that if this was done diversity would be destroyed because both the insured and Lohman were citizens of Illinois. The court held that this would require dismissal of the action for lack of complete diversity.

Finally, Professor Wright cites *Northern Assurance Co.* v. *Associated Independent Dealers,* 313 F.Supp. 816 (D. Minn. 1970) in support of his statement that an action

should not be dismissed if joinder under Rule 17(a) would destroy complete diversity. However, *Northern Assurance* held precisely what Westinghouse contends must be the result in this case.

In *Northern Assurance*, the insured's building was destroyed by fire and the insurer paid the insured the policy limit of $150,000 on a $300,000 loss. The payment was made in consideration of a loan receipt executed by the insured wherein the loan was repayable only in the event of, and to the extent of, a recovery by the insured against the allegedly negligent third-party tortfeasor. After the execution of this agreement, the insurer filed an action against the third-party tortfeasor in which the insurer was the only plaintiff. The defendant filed a motion for judgment on the pleadings asserting that the real party in interest was the insured because under the terms of the loan receipt, the insurer was not subrogated to the insured's claim and that accordingly since the insured was the real party in interest and was, as a Minnesota corporation, nondiverse to the defendant there was no diversity of citizenship.

The court held that under the facts presented to it, the insured was, indeed, the real party in interest and stated:

> "Rule 17(a) of the Federal Rules of Civil Procedure requires that 'every action shall be prosecuted in the name of the real party in interest * * * .' The same rule then allows the joinder of the real party in interest so as not to defeat the action. However, to allow the joinder in this case of . . . the real party in interest under the 'loan receipt' clearly would remove the present action from the jurisdiction of this court since the insured is a Minnesota corporation as is the defendant. Joinder of the insured would remove the complete diversity of citizenship required to maintain an action in federal court, under 28 U.S.C. § 1322." *Id.* at 818.

The Court further stated:

> "After defendant's motion was served and filed, however, plaintiff—evidently viewing defendant's motion with some concern from plaintiff's standpoint—executed a subrogation agreement with the insured to replace the earlier executed loan receipt. Plaintiff has asked the court to allow an amendment of its complaint to reflect this new situation which it contends and perhaps quite arguably would give or originally would have given the court jurisdiction since the present plaintiff would then be the real party in interest and thus there would be the requisite diversity of citizenship between parties. *If the amendment were to be allowed, recovery would of necessity be limited as a subrogation claim to the amount plaintiff actually paid, i.e.,* $150,000 *and no recovery in excess thereof could be had in this court for the Minnesota resident insured* who however apparently has a claim pending in State court for its loss in excess of the amount of insurance proceeds collected." *Id.* at 818. (Emphasis added.)

While *Northern Assurance* and *Lohman* are the converse of the fact situation in this case, both decisions correctly hold that if joinder of the partial subrogee/subrogor would result in a lack of complete diversity, the action must be dismissed. And *Northern Assurance* further holds that, if the action continues, any recovery would necessarily be limited to the amount owing to the party properly before the court, *i.e.,* the diverse party. Thus, *Northern Assurance* holds that the claim of the nondiverse party cannot be pursued in a federal forum. The obvious reason is that if the nondiverse party is permitted to pursue its claim in a federal court, the concept of complete diversity is rendered meaningless.

Westinghouse contends that INA, which is nondiverse to Westinghouse, cannot pursue its claim in this litigation.

INA's response to the Petition for Writ of Certiorari herein advances two reasons why the Petition should be denied.

First, INA contends that Rule 17 does not mean what it states, *i.e.*, that a claim must be pursued in the name of the real party in interest. It asserts that if the application of Rule 17(a) will defeat diversity jurisdiction, jurisdiction can be created by resort to the provisions of Rule 19. If INA were correct in insisting that its claim for the amount it paid Vepco *must* be litigated in the same action as any claim by Vepco for the uninsured portion of the loss, then, under Rule 19, INA is an indispensable party. *Travelers Indem. Co.* v. *Westinghouse Elec. Corp.*, 429 F.2d 77 (5th Cir. 1970); *Standard Accident Ins. Co.* v. *Lohman*, 295 F.2d 261 (7th Cir. 1961). But there is no requirement or basis upon which INA's nondiverse claim can or should be litigated in a federal forum. Thus, while a proper application of Rule 19 permits Vepco's claim to continue in the absence of INA, it clearly does not permit INA's claim to be pursued in its absence. The issue concerning the continuation of INA's claim must be resolved by Rule 17(a) and since INA admits, and both courts below have properly held, that INA is the real party in interest to the extent of its payment to Vepco, Rule 17(a) requires either that INA join the action or that, if INA fails to join, INA's claim must be dismissed.

Under the authorities cited herein and in the Petition for Writ of Certiorari, this situation cannot be changed simply because INA, being nondiverse to Westinghouse, cannot join the suit. However, to avoid this result, INA has taken on Vepco's robes and insists that Rule 19 operates to save its claim because Rule 19 operates to save Vepco's claim. It is clear, however, that Rule 19 cannot save INA's claim (1) because that rule was never intended to have such a result, and (2) because to do so negates the clear require-

ment of Rule 17 and avoids the requirement of complete diversity of citizenship.

Moreover, nothing in INA's response to the Petition for Writ of Certiorari and nothing in the decisions below can obscure the fact that INA ran the conscious risk that the application of Rule 19 would save it from complying with the requirements of Rule 17 and the requirements for complete diversity of citizenship. INA has stated no rejoinder to the specific cases cited by Westinghouse in support of its position. Rather, it seeks to distinguish these cases because they did not specifically involve the issue of diversity jurisdiction.

However, the application of Rule 17 is not dependent upon the existence or nonexistence of diversity of citizenship. It is a requirement that before any suit may be pursued in the federal court the claim therein asserted must be pursued in the name of, and by, the real party in interest. If the real party in interest is nondiverse to one of the defendants, the application of Rule 17 simply means that the nondiverse party may not bring its claim in the federal court.

INA asserts that Westinghouse asks this Court to permit multiple lawsuits, *i.e.*, one by Vepco in the federal court and one by INA in a proper forum. Westinghouse seeks no such result because the reality of this case is that Vepco has demonstrated no interest in pursuing Westinghouse. This case was filed by INA, it has been pursued at INA's expense by counsel employed by and representing INA. Just as INA is willing to run the risk that there is no diversity jurisdiction in this case, Westinghouse is willing to run the risk that Vepco will not pursue any claim against it.

INA and the Court of Appeals seem to express concern about the policy decision which will result from the

application of Rule 17(a). Both seem to be concerned about multiplicity of suits. However, both ignore the results of the failure to apply Rule 17(a). Failure to apply the rule clearly results in the creation of a new concept of diversity jurisdiction wherein any case of partial subrogation may be pursued in a federal court without regard to the citizenship of the real parties in interest in the litigation.

Moreover, the result of the decision below is to give the partially subrogated insurer, who has the primary, if not the exclusive, interest in the litigation, an election as to citizenship. For example, if the insurer desires to avoid litigation in the federal courts, it can simply discard the trappings of its insured's citizenship, assert that it is the real party in interest, and defeat diversity of citizenship. Conversely, if the insurer desires to create federal jurisdiction it can simply assume the citizenship of its insured and pursue an otherwise nondiverse claim in a federal forum. The decision below permits the insurer to determine the presence or absence of diversity of citizenship by giving the insurer a choice as to its citizenship, a choice which is not available to any other litigant.

However, Rule 17(a) clearly prohibits such a result. The proper application of Rule 17(a) precludes the determination of the proper forum by resort to the identity which the insurer chooses to assume for any given case because Rule 17(a) assures that the citizenship of the insurer remains constant and assures that diversity of citizenship is determined without regard to the fictional style placed on the pleadings by the insurer.

Secondly, INA contends that it has ratified the action "filed by Vepco" and that, having done so, the objection to the absence of complete diversity is not meritorious. However, Rule 17(a) specifically provides that ratification *"shall have the same effect as if the action had been commenced*

in the name of the real party in interest." In this case, ratification by INA is the same as if the action had been instituted in INA's name in the first place, and the institution of the action by INA, a Pennsylvania corporation, against Westinghouse, also a Pennsylvania corporation, constitutes a lack of complete diversity of citizenship and the resultant lack of jurisdiction in the federal court.

Accordingly, INA's reliance upon the doctrine of ratification is the unveiling of the frailty of its theory. For in the final analysis, INA's assertion of the ratification argument is a tacit concession that there is no jurisdiction in the federal courts.

CONCLUSION

For the reasons stated herein and in the Petition for Writ of Certiorari, Westinghouse respectfully requests that the Petition be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, James L. Sanderlin, one of the attorneys for Westinghouse Electric Corporation, a petitioner herein, and a member of the Bar of the Supreme Court of the United States hereby certify that, on the 8th day of February, 1974, I served copies of the Reply to Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit in the foregoing action on the several parties thereto, as follows:

(1) On the Insurance Company of North America, by mailing three copies of the same in a duly addressed envelope, with postage prepaid, to Edward A. Marks, Esq., Sands, Anderson, Marks & Clarke, 1420 Fidelity Building, Ninth & Main Streets, Richmond, Virginia 23219.

(2) On Stone & Webster Engineering Corporation, by mailing three copies of the same in a duly addressed envelope, with postage prepaid to Charles W. Laughlin, Esq., Christian, Barton, Parker, Epps & Brent, 1200 Mutual Building, Richmond, Virginia 23219.

(3) On the Virginia Electric and Power Company, by mailing three copies of the same in a duly addressed envelope, with postage prepaid, to Edward A. Marks, Esq., Sands, Anderson, Marks & Clarke, 1420 Fidelity Building, Ninth and Main Streets, Richmond, Virginia 23219, and by mailing three informational copies of the same in a duly

addressed envelope, with postage prepaid, to James E. Farnham, Esq., Hunton, Williams, Gay & Gibson, Post Office Box 1535, Richmond, Virginia 23212.

/s/ JAMES L. SANDERLIN

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